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Suhaimi bin Alias v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05(H)-53–01 OF 2018
HANIPAH FARIKULLAH, RAVINTHRAN AND NORDIN HASSAN JJCA
7 JULY 2023

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Kidnapping for ransom — Common intention — High Court convicted appellant for offence under s 3 of Kidnapping Act 1961 (Revised 1989) read together with s 34 of Penal Code — Appellant sentenced to life imprisonment and ten lashes of whipping — Whether it was proven that appellant was involved in kidnapping and confinement of victims for purpose of ransom — Whether appellant was identified as one of captors — Whether there was evidence to infer that appellant made demand for ransom — Whether it was sufficient if any one of captors had made demand as principle of common intention was invoked in the charge — Whether identification of appellant was safe and reliable — Whether sentence given by High Court judge excessive — Kidnapping Act 1961 (Revised 1989) s 3 — Penal Code s 34

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The appellant and two other persons namely Raja Mohd Hafiz ('Raja') and Nobi Hussein ('Nobi') were charged with the offence of kidnapping for ransom under s 3 of the Kidnapping Act 1961 (Revised 1989) ('the Act') read together with s 34 of the Penal Code. However, the charge against Raja was withdrawn as he had passed away. There were three victims in the present case, namely, Gholam ('SP3'), Rafik and Sojib, all of which were foreigners. The prosecution's case was that the appellant and the two other persons had impersonated police officers and abducted the victims from a minimarket and later had demanded ransom amounting to RM50,000 from SP3's son by the name of Mahadi Hassan ('SP4'). The prosecution had relied on the evidence of Arinawati ('SP1') who had lodged a police report after the appellant inquired her via a phone call about the license of the minimarket and the passport status of the victims and subsequently offered to 'settle' the problem. The prosecution also relied on the evidence of the raiding officer ('SP6') that the appellant was found in Room 48 of Hotel Comfort ('the hotel') when the victims were rescued by the police and that the appellant attempted to evade arrest and flee. In defence, the appellant and Nobi denied their involvement in the kidnapping of the victims. The appellant contended that at the material time, Raja had asked him to buy and bring takeaway food to Room 48 of the said hotel. When the appellant reached the hotel, he asked Nobi to send the food to the said room. Both the appellant and Nobi stated that they were arrested by the police

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in the lobby of the hotel and after the arrest, they were brought by the police to Room 48. At the end of the case, the learned High Court judge ('the LHCJ') found that the defence raised by the appellant and Nobi was a bare denial that did not raise a reasonable doubt on the prosecution's case. The LHCJ also found that the evidence of SP6 who found the appellant and Nobi in Room 48 was unrebutted and that SP3 had no reason at all to frame the appellant and Nobi for the kidnapping. Consequently, the LHCJ convicted the appellant and Nobi and sentenced them to life imprisonment and ten lashes of the whip. Aggrieved by the decision, the appellant filed the present appeal. The main issue in this appeal was whether there was evidence to prove that the appellant was involved in the kidnapping and confinement of the victims for the purpose of ransom. The subsidiary issues would be whether the appellant was identified as one of the captors and whether there was evidence to infer that either he made the demand for ransom or whether it was sufficient if any one of the captors had made the demand as the principle of common intention was invoked in the charge. With respect to the identification of the appellant, the appellant submitted that the identification was not safe and unreliable because during the identification parade conducted by SP2 shortly after the victims were rescued, SP1 and SP4 failed to identify the appellant but SP4 had identified the appellant at the trial which was held much later.

Held, dismissing the appeal against conviction and sentence:

(1) It had been held by eminent authorities that dock identification did not lose its probative value completely merely because of the absence of successful identification in a prior identification parade. Dock identification could be corroborated and rendered credible by other evidence to support it. It all depended on the overall evidence tendered by the prosecution. In the present case, the prosecution did not solely rely on the dock identification of the appellant by SP1 and SP4 alone. The prosecution also relied on the crucial evidence of one of the victims and the raiding officer to prove the involvement of the appellant in the kidnapping. One of the victims, ie, SP3 had successfully identified the appellant at the identification parade and during the trial whereas the raiding officer testified that he found the appellant in the hotel room where the kidnap victims were confined. In the premises, the LHCJ was not wrong to give weight to the dock identification. Therefore, there was no merit in the ground of appeal raised in the petition of appeal that the prosecution witnesses failed to identify the appellant as one of the three kidnappers (see paras 22 & 24–25).

(2) SP4 testified that the captors demanded money to be deposited into two bank accounts. The prosecution had proven that one of the deposits in the sum of RM200 was made to the account of the appellant. In any event, as the appellant was proved to be one of the captors and phone calls

were made by more than one captor, the LHCJ correctly inferred that the appellant had also made the demand (see para 29).

(3) It was not essential for the prosecution to prove that each of the captors made the demand for ransom money to prove the offence of kidnapping for ransom as common intention under s 34 of the Penal Code was invoked in the charge. It was not necessary for the prosecution to prove that an accused person actually committed the act that constituted the offence in question. It was enough if the prosecution proved that the accused persons committed a criminal act in furtherance of the common intention of all. Further, the common intention need not be in respect of the actual crime committed but in respect of a criminal act that resulted in the said crime (see paras 30 & 32).

(4) In the present case, there was overwhelming evidence in respect of the common intention of all the three accused persons to abduct the victims. They had impersonated police officers to bring the victims to a hotel room. The victims were blindfolded and confined in the room. This was a criminal act. It was not clear whether the appellant also made the demand for ransom, which was an ingredient of the offence, but having regard to the direct evidence of the common intention of all the accused persons to commit the criminal act of abduction, the appellant was equally liable under s 34 of the Penal Code for the offence of kidnapping for ransom which resulted from his criminal act (see para 34).

(5) In totality, the finding of fact by the LHCJ in respect of the two main ingredients of the offence, ie, abduction and demand for ransom was indisputable. Further, the LHCJ had given proper weight to the defence of the appellant in accordance with the directions given in the case of *Mat v Public Prosecutor* [1963] 1 MLJ 263. He found the defence to be a bare denial that did not raise a reasonable doubt on the whole of the prosecution's case. As correctly submitted by the learned deputy public prosecutor, a bare denial could not cast a reasonable doubt over a host of incriminating evidence. The appellant never explained why SP1, SP3 and SP4 would fabricate evidence about his involvement in the kidnapping. He also never explained why the raiding officer would lie about finding him in the hotel room with the kidnap victims. The court further noted that the defence of the appellant that he was merely waiting in the hotel lobby and that he was brought by the police to the hotel room in question was never put to the raiding officer who arrested him. For all the above reasons, the court found no reason to interfere with the decision of the High Court to convict the appellant of the offence of kidnapping for ransom (see paras 35–36).

(6) Based on s 3(1) of the Act, the punishment provided was either a death sentence or life imprisonment and whipping. In the present case, the court elected not to impose the death sentence, as such, the only

alternative punishment was life imprisonment and whipping which was what the High Court did in this case. The court found that the whipping of ten lashes was fully justified based on the facts of the case, inter alia: (a) the appellant and his accomplices targeted vulnerable individual, ie, foreign workers; (b) they impersonated police officers and abducted the victims; (c) the ransom demanded was a huge sum; and (d) two of the victims were badly beaten up. In the premises, interference with the sentence of the High Court was not warranted in all the circumstances of the case. However, the court noted that the life imprisonment sentence was ordered to run from the date of conviction which was on 19 December 2017 instead of the date of the arrest which was on 16 March 2014. As no reason was given by the High Court why the sentence made to run from the later date, the court varied the sentence and ordered that the life imprisonment sentence commenced from 16 March 2014 (see paras 39–41).

[Bahasa Malaysia summary

Perayu dan dua orang lagi iaitu Raja Mohd Hafiz ('Raja') dan Nobi Hussein ('Nobi') dituduh atas kesalahan menculik bagi mendapatkan wang tebusan di bawah s 3 Akta Penculikan 1961 (Disemak 1989) ('Akta tersebut') dibaca bersama s 34 Kanun Keseksaan. Bagaimanapun, pertuduhan terhadap Raja telah ditarik balik kerana dia telah meninggal dunia. Terdapat tiga mangsa dalam kes ini, iaitu, Gholam ('SP3'), Rafik dan Sojib, yang kesemuanya merupakan warga asing. Kes pendakwaan ialah perayu dan dua orang tersebut telah menyamar sebagai pegawai polis dan menculik mangsa dari sebuah pasar mini dan kemudiannya telah menuntut wang tebusan berjumlah RM50,000 daripada anak SP3 yang bernama Mahadi Hassan ('SP4'). Pihak pendakwaan bergantung kepada keterangan Arinawati ('SP1') yang telah membuat laporan polis selepas perayu menyoalnya melalui panggilan telefon mengenai lesen pasar mini tersebut dan status pasport mangsa-mangsa dan seterusnya menawarkan untuk 'settle' masalah tersebut. Pihak pendakwaan juga bergantung kepada keterangan pegawai serbuan ('SP6') bahawa perayu ditemui di Bilik 48 Hotel Comfort ('hotel tersebut') ketika mangsa-mangsa diselamatkan oleh polis dan perayu cuba mengelak daripada ditahan dan melarikan diri. Dalam pembelaan, perayu dan Nobi menafikan penglibatan mereka dalam penculikan mangsa-mangsa tersebut. Perayu berhujah bahawa pada masa yang material, Raja telah memintanya membeli dan membawa makanan yang dibungkus ke Bilik 48 hotel tersebut. Apabila perayu sampai di hotel, dia meminta Nobi menghantar makanan ke bilik tersebut. Kedua-dua perayu dan Nobi menyatakan bahawa mereka telah ditangkap oleh polis di lobi hotel tersebut dan selepas penahanan itu, mereka dibawa oleh polis ke Bilik 48. Pada akhir kes, hakim Mahkamah Tinggi yang arif ('HMT') mendapati pembelaan yang dibangkitkan oleh perayu dan Nobi adalah penafian semata-mata yang tidak menimbulkan keraguan munasabah terhadap kes pendakwaan. Hakim Mahkamah Tinggi juga mendapati keterangan SP6 yang

menemui perayu dan Nobi di Bilik 48 tersebut tidak disangkal dan SP3 tidak mempunyai sebab sama sekali untuk mereka cerita dan menuduh perayu dan Nobi bagi penculikan tersebut. Akibatnya, HMT mensabitkan perayu dan Nobi dan menjatuhkan hukuman penjara seumur hidup dan sepuluh sebatan. Terkilan dengan keputusan tersebut, perayu memfailkan rayuan semasa. Isu utama dalam rayuan ini ialah sama ada terdapat keterangan yang membuktikan bahawa perayu terlibat dalam penculikan dan pengurungan mangsa-mangsa bagi tujuan mendapatkan wang tebusan. Isu-isu subsidiari ialah sama ada perayu dikenal pasti sebagai salah seorang penculik dan sama ada terdapat keterangan untuk membuat kesimpulan bahawa sama ada dia membuat tuntutan untuk wang tebusan atau sama ada ia mencukupi jika mana-mana penculik telah membuat tuntutan tersebut memandangkan prinsip niat bersama telah digunakan dalam pertuduhan tersebut. Berkenaan dengan pengecaman diri perayu, perayu berhujah bahawa pengecaman diri tersebut tidak selamat dan tidak boleh dipercayai kerana semasa kawad cam yang dijalankan oleh SP2 sejurus selepas mangsa-mangsa diselamatkan, SP1 dan SP4 gagal mengecam perayu tetapi SP4 telah mengecam perayu di perbicaraan yang diadakan lebih terkemudian.

Diputuskan, menolak rayuan terhadap sabitan dan hukuman:

(1) Autoriti-autoriti yang terkemuka telah memutuskan bahawa pengecaman dok tidak kehilangan nilai probatif sepenuhnya hanya kerana ketiadaan pengecaman yang berjaya dalam kawad cam yang dilakukan sebelumnya. Pengecaman dok boleh disokong dan dijadikan kredibel oleh keterangan lain untuk menyokongnya. Semuanya bergantung kepada keterangan keseluruhan yang dikemukakan oleh pihak pendakwaan. Dalam kes ini, pihak pendakwaan tidak hanya bergantung kepada pengecaman dok ke atas perayu oleh SP1 dan SP4 sahaja. Pihak pendakwaan juga bergantung kepada keterangan penting salah seorang mangsa dan pegawai serbuan untuk membuktikan penglibatan perayu dalam penculikan tersebut. Salah seorang mangsa, iaitu, SP3 telah berjaya mengecam perayu pada kawad cam dan semasa perbicaraan manakala pegawai serbuan memberi keterangan bahawa dia menemui perayu di dalam bilik hotel di mana mangsa-mangsa culik dikurung. Di atas alasan tersebut, HMT tidak salah apabila memberi pemberatan kepada pengecaman dok tersebut. Oleh itu, tiada merit dalam alasan rayuan yang dibangkitkan dalam petisyen rayuan bahawa saksi-saksi pendakwaan gagal mengecam perayu sebagai salah seorang daripada tiga penculik tersebut (lihat perenggan 22 & 24–25).

(2) SP4 memberi keterangan bahawa penculik-penculik tersebut meminta wang untuk dimasukkan ke dalam dua akaun bank. Pihak pendakwaan telah membuktikan bahawa satu daripada deposit berjumlah RM200 telah dibuat ke akaun perayu. Dalam apa jua keadaan, memandangkan perayu telah dibuktikan sebagai salah seorang penculik dan panggilan

telefon dibuat oleh lebih daripada seorang penculik, HMT telah dengan betul membuat kesimpulan bahawa perayu juga telah membuat tuntutan wang tersebut (lihat perenggan 29).

(3) Tiada keperluan bagi pihak pendakwaan untuk membuktikan bahawa setiap penculik membuat tuntutan wang tebusan untuk membuktikan kesalahan menculik bagi mendapatkan wang tebusan kerana niat bersama di bawah s 34 Kanun Keseksaan digunakan dalam pertuduhan tersebut. Pendakwaan tidak perlu membuktikan bahawa orang yang dituduh benar-benar melakukan perbuatan yang menjadi kesalahan yang dipersoalkan. Cukuplah sekiranya pihak pendakwaan membuktikan bahawa tertuduh melakukan perbuatan jenayah bagi meneruskan niat bersama semua. Selanjutnya, niat bersama tidak semestinya berkaitan dengan jenayah sebenar yang dilakukan tetapi berkenaan dengan perbuatan jenayah yang mengakibatkan jenayah tersebut (lihat perenggan 30 & 32).

(4) Dalam kes ini, terdapat keterangan yang kukuh berkenaan dengan niat bersama ketiga-tiga tertuduh untuk menculik mangsa-mangsa. Mereka telah menyamar sebagai pegawai polis untuk membawa mangsa-mangsa ke bilik hotel. Mangsa-mangsa ditutup matanya dan dikurung di dalam bilik tersebut. Ini adalah perbuatan jenayah. Tidak jelas sama ada perayu juga membuat tuntutan wang tebusan, yang merupakan ramuan kesalahan tersebut, tetapi dengan mengambil kira keterangan langsung tentang niat bersama semua tertuduh untuk melakukan perbuatan jenayah penculikan, perayu adalah sama-sama bertanggungjawab di bawah s 34 Kanun Keseksaan atas kesalahan menculik bagi mendapatkan wang tebusan yang berpunca daripada perbuatan jenayahnya (lihat perenggan 34).

(5) Secara keseluruhannya, penemuan fakta oleh HMT berkenaan dengan dua ramuan utama kesalahan tersebut, iaitu, penculikan dan permintaan untuk wang tebusan tidak boleh dipertikaikan. Selanjutnya, HMT telah memberikan pemberatan sewajarnya kepada pembelaan perayu mengikut arahan yang diberikan dalam kes *Mat v Public Prosecutor* [1963] 1 MLJ 263. Beliau mendapati pembelaan tersebut adalah penafian semata-mata yang tidak menimbulkan keraguan munasabah pada keseluruhan kes pendakwaan. Seperti yang dihujahkan dengan betul oleh timbalan pendakwa raya yang bijaksana, penafian semata-mata tidak boleh menimbulkan keraguan munasabah terhadap keterangan yang memberatkan yang banyak. Perayu tidak pernah menjelaskan mengapa SP1, SP3 dan SP4 perlu mereka keterangan tentang penglibatannya dalam penculikan tersebut. Dia juga tidak pernah menjelaskan mengapa pegawai serbuan perlu berbohong tentang penemuannya di bilik hotel tersebut bersama mangsa-mangsa culik tersebut. Mahkamah seterusnya mendapati pembelaan perayu bahawa

dia hanya menunggu di lobi hotel dan bahawa dia dibawa oleh polis ke bilik hotel berkenaan tidak pernah dikemukakan kepada pegawai serbuan yang menangkapnya. Atas semua alasan di atas, mahkamah mendapati tiada sebab untuk mengganggu keputusan Mahkamah Tinggi untuk mensabitkan perayu atas kesalahan menculik bagi mendapatkan wang tebusan (lihat perenggan 35–36).

(6) Berdasarkan s 3(1) Akta tersebut, hukuman yang diperuntukkan adalah sama ada hukuman mati atau penjara seumur hidup dan sebatan. Dalam kes ini, mahkamah memilih untuk tidak menjatuhkan hukuman mati, justeru, satu-satunya hukuman alternatif ialah penjara seumur hidup dan sebatan yang mana Mahkamah Tinggi lakukan dalam kes ini. Mahkamah mendapati hukuman sebat sepuluh sebatan adalah wajar berdasarkan fakta kes, antara lain: (a) perayu dan rakan-rakan sejenayahnya menyasarkan individu yang lemah, iaitu pekerja-pekerja asing; (b) mereka menyamar sebagai pegawai polis dan menculik mangsa-mangsa; (c) wang tebusan yang dituntut adalah dalam jumlah yang besar; dan (d) dua daripada mangsa telah dipukul dengan teruk. Di atas premis tersebut, campur tangan terhadap hukuman Mahkamah Tinggi adalah tidak wajar dalam semua keadaan kes. Bagaimanapun, mahkamah mendapati bahawa hukuman penjara seumur hidup telah diperintahkan bermula dari tarikh sabitan iaitu pada 19 Disember 2017 dan bukannya tarikh tangkapan iaitu pada 16 Mac 2014. Oleh kerana tiada alasan diberikan oleh Mahkamah Tinggi mengapa hukuman yang dibuat untuk berjalan dari tarikh yang kemudian, mahkamah mengubah hukuman dan memerintahkan supaya hukuman penjara seumur hidup bermula dari 16 Mac 2014 (lihat perenggan 39-41).]

Cases referred to

Farose bin Tamure Mohamad Khan v PP and other appeals [2016] 6 MLJ 277, FC (refd)
Loo Ting Meng v PP [2014] 6 MLJ 208, FC (refd)
Low Kian Boon v PP [2010] 4 MLJ 425; [2010] 5 CLJ 489, FC (refd)
Mahbub Shah v King Emperor [1945] LR 72, PC (refd)
Mat v PP [1963] 1 MLJ 263 (refd)
Ong Poh Cheng v PP [1998] 4 MLJ 8; [1998] 4 CLJ 1, CA (refd)
Tan Hung Thiam & Anor v PP [1991] 1 SLR 101, CA (refd)

Legislation referred to

Kidnapping Act 1961 ss 2, 3, 3(1)
Penal Code ss 34, 365

Appeal from: Criminal Case No 45C-13–12 of 2014 (High Court, Shah Alam)

K Annamali Ramu a/l Kandasamay (KA Ramu Vasanthi & Assoc) for the appellant.
Zaki Asyraf bin Zubir (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Ravinthran JCA:

INTRODUCTION

[1] The appellant and two other persons, namely Raja Mohd Hafiz bin Raja Raja Shuib and Nobi Hussein bin Abutar, were charged with the offence of kidnapping for ransom under s 3 of the Kidnapping Act 1961 (Revised 1989). The charge read as follows:

> Bahawa kamu bersama-sama pada 16 Mac 2014 jam lebih kurang 4.00 pagi bertempat di No. 31, Jalan Pasar Baru, Off Jalan Meru Klang, dalam daerah Klang, dalam Negeri Selangor Darul Ehsan, dengan niat bersama hendak membuat tebusan, menculik tiga orang lelaki bernama Md Gholam Faruque (No. Passport: F0117271), Mohamed Rafik (No. Passpot: Tiada) dan Sojib (No. Passpot: Tiada), serta mengurung mereka dengan salah di dalam bilik hotel No. 48, Hotel Comfort No. 26A/40, Leboh Tapah, Off Jalan Goh Hock Huat, Klang bagi maksud mendapatkan wang tebusan sebanyak RM50,000.00. Oleh itu, kamu telah melakukan satu kesalahan di bawah Seksyen 3 Akta Penculikan 1961 (Semakan 1989) dan dibaca bersama seksyen 34 Kanun Keseksaan.

[2] The charge against Raja Mohd Hafiz bin Raja Shuib was withdrawn on 14 March 2017 as he passed away. The trial proceeded only against the appellant and Nobi Hussein. The appellant and Raja Mohd Hafiz bin Raja Shuib (deceased) are Malaysian citizens whereas Nobi Hussein is a Myanmar citizen. At the conclusion of the case, the learned High Court judge convicted the appellant and Nobi Hussein and sentenced them to life imprisonment. The appellant has appealed against both the conviction and sentence.

CASE OF THE PROSECUTION

[3] The kidnap victims are Md Gholam Faruque ('SP3'), Mohamed Rafik and Sojib. All three are foreigners. Gholam is a Bangladeshi passport holder. The other two victims did not possess any travel documents but were believed to be Bangladeshis. These two victims were not called by the prosecution to give evidence as they had returned to their country of origin by the time of the trial.

[4] The prosecution called a total of eight witnesses. The principal witnesses were Gholam ('SP3'), his son, Mahadi Hasan ('SP4') and the complainant, one Arinawati bt Maliki ('SP1'). The evidence of the prosecution as summarised by the learned High Court judge is as follows.

[5] Arinawati and her husband went to a minimarket in Klang on the date and time stated in the charge to purchase chicken. Arinawati remained in the car whereas her husband went inside the minimarket. After some time, Arinawati noticed that Gholam and his nephew Sojib emerging from the minimarket. She referred to Gholam as 'Faruque' and identified him in court. They were accompanied by three men. She was acquainted with Gholam as he worked in the minimarket. Arinawati and her husband left soon after to run other errands. Mahadi Hassan later called the husband of Arinawati and told him that his father was taken away by the police.

[6] After meeting Mahadi Hassan in person, Arinawati called one 'Inspector Suhaimi' (identified later as the 'appellant') on the phone asking for 'help' to ascertain whether Gholam, Sojib and one Rafiq were detained by the police. The appellant inquired with Arinawati about the licence of the minimarket and the passport status of Gholam, Sojib and Rafiq. He offered to 'settle' the problem. Arinawati decided to lodge a police report on behalf of Mahadi Hassan because the latter was not fluent in Malay.

[7] The star witness for the prosecution was Gholam. He worked in the minimarket as a deliveryman. At the time in question, he was in the minimarket with his son, Mahadi Hassan, Sojib, Rafiq and some other friends. Three men, which included the appellant, entered the shop and ordered him, Sojib and Rafiq to produce the passports. Gholam and the other two victims were then told that they would be brought to the police station. Gholam was taken to a van by the appellant whereas the other two victims were forced to enter a car by the other accused persons. Gholam was blindfolded and brought to a room after being made to climb a staircase. He realised that he was in a room with Sojib and Rafiq. Gholam then heard a conversation between one of his captors and his son which was conducted on his handphone. He could hear one of the captors demanding RM50,000 as ransom money from his son. When the police forcibly opened the door later and removed his blindfold, he saw Sojib and Rafiq. He also saw the appellant and Nobi Hussein in the room. He identified both of them in court.

[8] Mahadi Hassan testified that on the night in question, three men entered the minimarket and identified themselves as police officers. They demanded to see the passports of his father (Gholam), Sojib and Rafiq. Mahadi retrieved his father's passport and gave it to one of the men. Nonetheless, Gholam, Sojib and Rafiq were all taken away in two cars by the men. He identified the instant appellant in court as one of the men who took away his father. Later, someone called him a few times using his father's handphone and demanded RM50,000 for his release. CIMB Bank and Maybank account numbers were given to him for the money to be deposited. Mahadi Hassan

deposited RM8,000 in several transactions using the ATM machine into the CIMB Bank and Maybank accounts given to him by the caller.

[9] The next crucial witness was the raiding officer, Insp Mohd Anuar bin Ibrahim ('SP6'). On 17 March 2014, at about 7.45am, he led a team to a hotel room in Klang. The police team opened the door by force when the occupants refused to unlock it. Insp Mohd Anuar found Gholam, Sojib and Rafiq in the room. They were still blindfolded and tied up. The appellant and the other two accused persons were also in the room. They were arrested by the police whereas Sojib and Rafiq were sent to the hospital for treatment as they were injured. Insp Mohd Anuar identified the appellant in court. He said the appellant was at the door when it was forced open. He said that the appellant attempted to evade arrest and flee.

FINDING AT THE END OF THE PROSECUTION'S CASE

[10] The learned High Court judge considered s 3 of the Kidnapping Act 1961 (Revised 1989) which defines the offence of kidnapping as intentionally holding a person for ransom by abducting him or confining him or restraining him. He found that the appellant and the other accused persons had been confined for the purpose of obtaining a ransom. He found as a fact that a demand for ransom was made to the son of one of the victims, ie Gholam by an unknown person or persons using the latter's handphone. It was established in evidence that part of the ransom money was credited to the account of the appellant. The learned considered the crucial evidence of Gholam and Mahadi Hassan that the appellant and the other accused persons took away the kidnap victims from the minimarket on the night in question after impersonating police officers. He also had regard to the evidence of the raiding officer ('SP6') that the appellant was found in the hotel room when the victims were rescued by the police.

[11] Based on the above evidence, the learned High Court judge called for the defence of the appellant and the third accused person (Nobi Hussein).

THE DEFENCE

[12] Both the appellant and Nobi Hussein elected to give sworn testimony. He said that he was in the lobby of Hotel Comfort when the police arrested him. He went to the hotel because a friend, Raja Mohd Hafiz bin Raja Shuib (the deceased first accused) requested him to buy and bring takeaway food. He asked Nobi Hussein to assist him. When he reached the hotel, the appellant asked Nobi Hussein to take the food from him and send it to Room 48. He was arrested by the police in the lobby and brought to the said room. He recognised Raja Mohd Hafiz bin Raja Shuib but did not recognise the others who were in

the room with the police team. The appellant told the court that Raja Mohd Hafiz bin Raja Shuib had deposited RM200 into his bank account because he did some wiring work for him. He denied being involved in the kidnapping of Gholam, Sojib and Rafiq.

[13] The defence of Nobi Hussein was as follows. He received a call from the appellant about buying food takeaways on 17 March 2014. After collecting the food with the appellant, he travelled in the latter's car to Hotel Comfort. He was told to go to Room 48 to deliver the food. Someone wearing a hotel uniform opened the door and took the food from him. When Nobi Hussein returned to the hotel lobby, he was arrested by the police and taken to Room 48. He denied being involved in the kidnapping in question.

DECISION OF HIGH COURT AT THE END OF THE DEFENCE CASE

[14] The learned High Court judge found that the defence of the appellant and Nobi Hussein was a bare denial that did not raise a reasonable doubt on the case of the prosecution. He rejected their claim that they had nothing to do with the kidnapping of the victims because of the evidence of SP1, SP3 and SP4. He also found that the evidence of the police officers, especially the raiding officer who found the appellant and Nobi Hussein in Room 48 was unrebutted. He also found that Gholam had no reason at all to frame the appellant and Nobi Hussein for the kidnapping.

[15] The learned High Court judge concluded that the prosecution had proved its case beyond reasonable doubt that the appellant, Nobi Hussein and Raja Mohd Hafiz bin Raja Shuib committed the offence with common intention as stated in the charge. He convicted the appellant and Nobi Hussein. After considering the age, the antecedents of the appellant and Nobi Hussein, the learned High Court judge opted to impose life imprisonment and ten lashes of the whip instead of the death sentence on them.

ISSUES IN THE APPEAL

[16] The principal grounds raised in the petition of appeal are:

(a) that there was no credible evidence to establish a prima facie case;

(b) that the prosecution witnesses failed to identify the appellant;

(c) that there was no evidence led to prove who made the demand for ransom;

(d) that the *Mat v Public Prosecutor* direction was not followed; and

(e) that the sentence was excessive.

[17] In the brief written submission, counsel for the appellant argued that his client should have been charged under s 365 of the Penal Code instead of the Kidnapping Act 1961(Revised 1989). The reason for this argument is that the appellant went to the lobby of Hotel Comfort because Raja Mohd Hafiz (deceased) had requested him to purchase food. The appellant was accompanied by Nobi Hussein when he performed the said task for Raja Mohd Hafiz (deceased). The police arrested him at the lobby of the hotel but later brought him to Room 48. Counsel for the appellant submitted that the prosecution failed to tender any evidence to the effect that it was the appellant who made the demand for the ransom money to be paid to secure the release of the kidnap victims. The same reason was canvassed during oral argument as well. No other grounds were argued. Section 365 of the Penal Code (Revised 1997) provides for the offence of simple kidnapping or abduction without the element of ransom. It reads as follows:

> Whoever kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine.

[18] The main issue in this appeal is whether there was evidence to prove that the appellant was involved in the kidnapping and confinement of the victims for the purpose of ransom. The subsidiary issues would be whether the appellant was identified as one of the captors and whether there was evidence to infer that either he made the demand for ransom or whether it is sufficient if any one of the captors had made the demand as the principle of common intention was invoked in the charge.

IDENTIFICATION OF THE APPELLANT

[19] Gholam was the only kidnap victim who testified for the prosecution as the other two victims had returned to their country of origin. The police officer who conducted the identification parade testified that Gholam successfully picked out the appellant and Nobi Hussein from the line up as the individuals who abducted him and the other two victims from the minimarket in question. Gholam also identified the appellant and Nobi Hussein in court during the trial. However, before the trial judge and in the petition of appeal, the identification of the appellant was made an issue for the following reason. Although this issue was not raised during oral argument before us, for the sake of completeness, we shall address it below.

[20] At the identification parade conducted by SP2 shortly after the rescue of the victims, Arinawati and Mahadi Hassan failed to identify the appellant. However, Mahadi Hassan identified the appellant at the trial which was held much later. It was argued that for this reason, the identification is not safe and is unreliable. Our view on this ground of appeal is as follows.

[21] We would agree that dock identification by an eyewitness is strengthened by a previous successful identification during an identification parade that is held soon after the incident in question. We would also agree that a conviction that is based on the dock identification for the first time by a solitary witness without any other evidence to support it is not safe.

[22] However, it has been held by eminent authorities that dock identification does not lose its probative value completely merely because of the absence of successful identification in a prior identification parade. Dock identification can be corroborated and rendered credible by other evidence to support it. It all depends on the overall evidence tendered by the prosecution.

[23] In *Ong Poh Cheng v Public Prosecutor* [1998] 4 MLJ 8; [1998] 4 CLJ 1, the Court of Appeal accepted the dock identification of a witness and said as follows:

> Generally speaking, an identification at an identification parade, held usually a short time after the incident, would tend to strengthen the prosecution's case but it does not follow that the lack of it would be fatal, or would destroy a court or dock identification. *It must necessarily depend on the facts and circumstances of each particular case. Unlike in the case of Arumugam s/o Muthusamy v Public Prosecutor* [1998] 3 MLJ 73 *where the court relied solely on the dock identification, the present case there are other cogent evidence to put the appellant at the scene of the robbery*. The court's identification was merely to confirm this. On the facts and circumstances of this case, the court or dock identification of the appellant was rightly accepted. (Emphasis added.)

[24] In the instant case, the prosecution did not solely rely on the dock identification of the appellant by Arinawati and Mahadi Hassan alone. The prosecution also relied on the crucial evidence of one of the victims and the raiding officer to prove the involvement of the appellant in the kidnapping. Gholam testified that the appellant was one of the three accused persons who abducted him and the other two victims from the minimarket in question. He successfully identified him at the identification parade and during the trial. His identification evidence must be considered to be of high quality as it was not based on a fleeting glimpse of the appellant. The appellant had conversed with him in the minimarket for a while before taking him away to be confined in a hotel room. Gholam also said that the appellant had placed a blindfold on him in the car. When the blindfold was removed after being rescued by the police, Gholam saw the appellant in the hotel room.

[25] The raiding officer ('SP6') gave evidence that he found the appellant in the hotel room in question where the kidnap victims were confined. The appellant was by the door when it was forced open. Although, the appellant said in his evidence that he was brought to the room by the police, the trial

judge accepted the evidence of the raiding officer. In the premises, this is not a case where the identification of an accused person is based solely on the dock identification of a solitary witness. The dock identification of Arinawati and Mahadi Hassan is clearly supported by the evidence of Gholam and the raiding officer. In the premises, the learned High Court judge was not wrong to give weight to the dock identification. Only after considering the evidence of Gholam and that of the raiding officer ('SP6'), the learned High Court judge accepted the dock identification by Arinawati and Mahadi Hassan of the appellant. In the premises, we find no merit in the ground of appeal raised in the petition of appeal that the prosecution witnesses failed to identify the appellant as one of the three kidnappers.

DEMAND FOR RANSOM

[26] Section 2 of the Kidnapping Act 1961 (Revised 1989), defines 'ransom' as:

> any money, price or consideration paid or demanded for the release of a person abducted or wrongfully confined or wrongfully restrained; ...

[27] In the petition of appeal and the written submission filed on behalf of the appellant, it was argued that the prosecution failed to lead evidence about the person who made the demand for ransom. Gholam said that he heard one of the captors asking for ransom money about ten to 12 times. He could not see who was on the phone making the demand as he was blindfolded. As for his son, Mahadi Hassan who answered the said phone calls, all that he could say about the demand for ransom money was that it was made several times and that the handphone of his father (Gholam) was used. He said different individuals called him as he heard different voices.

[28] Although the prosecution failed to lead direct evidence through Gholam and Mahadi Hassan to the effect that the appellant had made the demand for ransom, in our view, the learned High Court judge correctly addressed circumstantial evidence and the principle of joint criminal liability under s 34 of the Penal Code to make a finding that the offence of kidnapping for ransom was proved. Our reasons are as follows.

[29] The prosecution tendered the evidence of Mahadi Hassan that the appellant was one of the accused persons who abducted his father. We noted earlier that despite the failure of Mahadi Hassan to identify the appellant in the identification parade, there was overwhelming evidence to prove this element of the offence. There was unassailable evidence from Gholam about the appellant's involvement in his kidnapping. The raiding officer found the appellant in the room with the kidnap victims. Mahadi Hassan told the court that the captors demanded money to be deposited into two bank accounts. He

deposited a total of RM8,000 in several transactions into these accounts. He kept all the deposit slips which were tendered in evidence. The prosecution proved that one of the said deposits in the sum of RM200 was made to the account of the appellant. The appellant in his defence said that Raja Mohd Hafiz bin Raja Shuib owed him money for some wiring work and had deposited RM200 into his account. But there would be no reason for Hassan Mahadi to deposit this amount into the account of the appellant. In any event, as the appellant was proved to be one of the captors and phone calls were made by more than one captor, the learned High Court judge correctly inferred that the appellant had also made the demand.

[30] We are also of the view that it is not essential for the prosecution to prove that each of the captors made the demand for ransom money to prove the offence of kidnapping for ransom as common intention under s 34 of the Penal Code was invoked in the charge. Thus, the question that arises is whether joint criminal liability can be imposed on the appellant even if he did not make the demand for ransom. We shall cite below some statements of law from eminent authorities that considered s 34.

[31] Section 34 of the Penal Code reads as follows:

> When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

In the seminal case of *Mahbub Shah v King Emperor* [1945] LR 72 IA 148, the Privy Council in construing the s 34 of the Indian Penal Code which is identical to ours, said as follows:

> Section 34 lays down a principle of joint liability in the doing of a criminal act. The section does not say 'the common intention of all', nor does it say 'an intention common to all'. Under the section, the essence of that liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. To invoke the aid of s 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, *then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone*. (Emphasis added.)

[32] Thus, it is not necessary for the prosecution to prove that an accused person actually committed the act that constituted the offence in question. It is enough if the prosecution proves that the accused persons committed a criminal act in furtherance of the common intention of all. Furthermore, the common intention need not be in respect of the actual crime committed but in respect of a criminal act that resulted in the said crime. This was made clear by Md Raus Sharif PCA who delivered the judgment of the court at the Federal Court in the case of *Farose bin Tamure Mohamad Khan v Public Prosecutor and*

other appeals [2016] 6 MLJ 277 in the following passage:

> [65] With respect, we are also not persuaded by the two Singapore Court of Appeal authorities cited and argued before us. Despite the lengthy explanation on the issue of common intention in particular in Daniel Vijay, we still hold the view which had been widely accepted by our courts that in a criminal prosecution where s 34 of the Penal Code is invoked, it is not *incumbent on the prosecution to prove that there existed between the participants a common intention to commit the crime actually committed. As long as there is a common intention to commit a criminal act, which resulted in the commission of a crime actually committed, s 34 can operate against all persons involved in the commission of the actual crime*.
>
> [66] The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case. Direct evidence as proof is difficult to procure because the common intention is essentially a state of mind. (Emphasis added.)

[33] In the older the Singapore Court of Appeal case of *Tan Hung Thiam & Anor v Public Prosecutor* [1991] 1 SLR 101 (cited with approval by our Federal Court in *Low Kian Boon v Public Prosecutor* [2010] 4 MLJ 425; [2010] 5 CLJ 489), Chua J also said that it is sufficient for the prosecution to prove that there existed a common intention to commit a criminal act and not the actual crime committed. The relevant passage is as follows:

> On the question of common intention under s 34 of the Penal Code, the trial judges relied on a long line of cases. It is clear from the decisions of the Privy Council in *Barendra Kumar Ghosh v Emperor* AIR [1925] PC 1 and *Mahboob Shah v Emperor* AIR [1945] PC 118 and from the decision of the Court of Criminal Appeal of Singapore in *Mimi Wong & Anor v Public Prosecutor* [1972] 2 MLJ 75 that, in a criminal prosecution where s 34 is invoked, it is not incumbent on the prosecution to prove that there existed between the participants a common intention to commit the crime actually committed. For s 34 to apply it is sufficient if the prosecution prove that there was in existence a common intention between all the persons who committed the criminal act and that the act which constituted the offence charged was done in furtherance of that common intention.

[34] In the instant case, there was overwhelming evidence in respect of the common intention of all the three accused persons including the appellant herein to abduct the victims. They had impersonated police officers to bring the victims to a hotel room. The victims were blindfolded and confined in the room. This is a criminal act. It is not clear whether the appellant also made the demand for ransom which is an ingredient of the offence in question. However, having regard to the direct evidence of the common intention of all the accused persons to commit the criminal act of abduction, the appellant is equally liable under s 34 of the Penal Code for the offence of kidnapping for ransom which resulted from his criminal act. In the premises, there is no merit in the submission that the prosecution failed to prove the essential ingredient of the demand for ransom money and therefore the charge should be reduced to

simple kidnapping or abduction under s 365 of the Penal Code (Revised 1997). We therefore find that the learned High Court judge correctly held that common intention under s 34 was proved against all the accused persons including the appellant.

[35] In conclusion, the finding of fact by the learned High Court judge in respect of the two main ingredients of the offence, ie, abduction and demand for ransom is indisputable. We also find that the learned High Court judge gave proper weight to the defence of the appellant in accordance with the directions given in the well-known case of *Mat v Public Prosecutor* [1963] 1 MLJ 263. He found the defence to be a bare denial that did not raise a reasonable doubt on the whole of the prosecution's case. As correctly submitted by the learned deputy public prosecutor, a bare denial cannot cast a reasonable doubt over a host of incriminating evidence (see *Loo Ting Meng v Public Prosecutor* [2014] 6 MLJ 208). The appellant never explained why Arinawati, Gholam and his son would fabricate evidence about his involvement in the kidnapping. He also never explained why the raiding officer would lie about finding him in the hotel room with the kidnap victims. We are mindful that there is no burden on him to prove his innocence but his bare denial did not explain away the highly incriminating evidence of the prosecution.

[36] We also note that the defence of the appellant that he was merely waiting in the hotel lobby and that he was brought by the police to the hotel room in question was never put to the raiding officer who arrested him. It was only put that the appellant was not in the hotel room in question. For all the above reasons, we find no reason to interfere with the decision of the High Court to convict him of the offence of kidnapping for ransom. We find the conviction to be safe and we dismiss the appeal against the same.

SENTENCE

[37] The appellant has also appealed against the sentence imposed by the learned High Court judge. Both the appellant and Nobi Hussein were spared the death sentence. Instead, they were sentenced to life imprisonment with effect from 19 December 2017 and ten lashes of the whip.

[38] Counsel for the appellant did not canvass any grounds for the reduction of sentence in the written submission or during oral argument. However, in the petition of appeal, it was stated that the sentence was manifestly excessive.

[39] Section 3(1) of the Kidnapping Act 1961 (Revised 1989) which creates the offence in question reads as follows:

> (1) Whoever, with intent to hold any person for ransom, abducts or wrongfully confines or wrongfully restrains such person shall be guilty of an offence and shall be

punished on conviction with death or imprisonment for life and shall, if he is not sentenced to death, also be liable to whipping.

[40] It must be noted that the punishment provided is either a death sentence or life imprisonment and whipping. In the instant case, the court elected not to impose the death sentence. In the premises, the only alternative punishment that can be imposed on the appellant is life imprisonment and whipping which is what the High Court did in this case. Counsel for the appellant argued when challenging the conviction that the charge should have been preferred under s 365 of the Penal Code. We disagreed with him as the element of demand for ransom is proved in this case because of the invocation of common intention under s 34 of the Penal Code by the prosecution. Therefore, the High Court did not commit any error in convicting the appellant under s 3(1) of the Kidnapping Act 1961 (Revised 1989). It follows that the punishment of life imprisonment was the only legal sentence available to the High Court once it elected not to impose the death sentence.

[41] In respect of the whipping of ten lashes, we find that it was fully justified on the facts of the case. The appellant and his accomplices targeted vulnerable persons, ie foreign workers. They impersonated police officers and abducted them. The ransom demanded was a huge sum. Two of the victims were badly beaten up as the raiding officer told the court that they were immediately sent to the hospital after being rescued. In the premises, interference with the sentence of the High Court is not warranted in all the circumstances of the case. However, we note that the life imprisonment sentence was ordered to run from the date of conviction which was on 19 December 2017 instead of the date of the arrest which was on 16 March 2014. As no reason was given by the High Court why the sentence made to run from the later date, we shall vary the sentence and order that the life imprisonment sentence commences from 16 March 2014.

[42] In conclusion, subject to the above variation in respect of the commencement of the imprisonment sentence, the appeal against the conviction and sentence is dismissed.

Appeal against conviction and sentence dismissed.

Reported by Dzulqarnain Ab Fatar